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August 21, 2008

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: MB Docket No. 07-198
Ex Parte Presentation

Dear Ms. Dortch:

By and through its undersigned counsel, Viacom Inc. ("Viacom") hereby submits this written *ex parte* presentation in response to the letter filed with the Commission on July 25, 2008 by Media Access Project *et al.* in the above-captioned proceeding.[1] In its letter, MAP engages in an ultimately futile attempt to paint a broad picture of Commission authority to regulate the wholesale market for the sale of video programming generally and independent video programmers specifically. MAP's selective citations and apparent willingness to ignore countervailing precedent, however, cannot mask the fact that there is no legal basis or factual support for such regulation.

The MAP Letter barrels headlong into an analysis that purports to show how various provisions of the Communications Act (the "Act") might give the Commission authority to regulate the wholesale programming market, including non-vertically integrated, independent cable programmers. MAP, however, ignores unambiguous statutory limitations and FCC decisions that make clear that no

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[1] *See* Letter from Parul P. Desai, Media Access Project ("MAP"), to Marlene H. Dortch, Federal Communications Commission, MB Docket No. 07-198 (dated July 25, 2008) (the "MAP Letter"). MAP filed the letter on behalf of Public Knowledge, Consumers Union and Free Press.

provision of law permits the Commission to intrude on the wholesale market for the sale of video programming. Likewise, MAP's false premise that cable programmers engage in the "tying" of popular networks to less popular programming simply crumbles under the overwhelming weight of record evidence confirming that multichannel video programming distributors ("MVPDs") *are not forced to accept content that they do not wish to carry* and that no "tying" is occurring in this competitive market. Indeed, the American Cable Association ("ACA") has admitted that programmers do not engage in tying.[2]

In order to ensure that the Commission is positioned to objectively evaluate the jurisdictional issues attendant to any proposed regulation of the wholesale video programming market, Viacom[3] provides below a comprehensive response to the MAP Letter.

I. BY ITS PLAIN TERMS, SECTION 628 DOES NOT PERMIT BROAD REGULATION OF THE WHOLESALE MARKET FOR THE SALE OF VIDEO PROGRAMMING, LET ALONE THE SALE OF INDEPENDENT VIDEO PROGRAMMING

As the MAP Letter notes, Section 628 of the Act is the "basic program access provision."[4] While it does "seek[] to ensure the development of

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[2] *See* Comments of American Cable Association, MB Docket No. 07-198 (filed Jan. 3, 2008) ("ACA Comments"), at 13.

[3] Viacom is an independent video programmer that is not affiliated with any MVPD. As a leading global entertainment content company, Viacom owns and operates a variety of programming networks that provide consumers with a wide array of high-quality programming choices. Through its MTV Networks ("MTVN") and BET Networks ("BETN") subsidiaries, and often by relying on the talents of independent producers, Viacom programs 24 specialized music and entertainment networks targeted to consumers ranging from young children to teenagers to adults. MTVN, for example, programs channels that offer something for everyone, including, Nickelodeon (a channel renowned for its devotion to educational children's programming); Noggin (which offers commercial-free programming oriented toward preschoolers); MTV (a popular retreat for music lovers); CMT (an American country music-oriented network); TV Land (a channel committed to displaying the best of classic programming); Comedy Central (a prominent supplier of comedy-oriented programming); and Spike (the first network created especially for men). MTVN also programs a number of channels that cater to the interests of minority and underserved audiences, such as MTV Tr3s (for Hispanic Americans) and Logo (for gay and lesbian viewers). Likewise, BETN offers a variety of programming services to its viewers including BET, BET J and BET Gospel. BET was the nation's first, and remains the preeminent, programming service specifically targeted to African Americans.

[4] MAP Letter, at 2 (*citing* 47 U.S.C. § 548).

competition and diversity in video programming,"[5] that hardly means that the law confers on the Commission blanket authority to regulate every aspect of the purchase and sale of video programming networks. Quite the contrary, the law is avowedly narrow in scope, intentionally limiting regulation to only *vertically integrated* programming networks to ensure equal access for all MVPDs. Although MAP simply ignores it, the plain text of Section 628 specifically says that it "shall be unlawful for a cable operator [or] a satellite cable programming vendor *in which a cable operator has an attributable interest* . . . to engage in unfair methods of competition or unfair or deceptive acts or practices . . . ."[6] Even a cursory reading of these terms makes clear that Section 628 applies only to vertically integrated cable programmers, not independently-owned networks such as those owned by Viacom.[7]

Equally unpersuasive is MAP's suggestion that because the statute lays out only the "minimum contents" of any "regulations," the Commission somehow has authority to regulate in any way it sees fit beyond the "minimum."[8] Of course, such an expansive reading of Section 628 clashes fiercely with the express terms of the Act. In particular, Section 628 permits regulation only to the extent necessary to ensure that all MVPDs have access to vertically integrated programming. MAP cites two orders to suggest that the Commission can adopt "additional rules," but even the MAP Letter acknowledges that in both cases the Commission made clear that its authority to adopt regulation beyond the terms laid out in the statute was limited to actions needed to "accomplish the program access

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[5] *Id.*

[6] 47 U.S.C. § 548(b) (emphasis supplied).

[7] The legislative history of Section 628 also makes clear that the provision was purposely "limited to vertically integrated companies because [Congress found that] the incentive to favor cable over other technologies is most evident with them." S. Rep. No. 101-381 (1990), at 26. The Commission itself has repeatedly recognized that Section 628 is limited in scope to dealing with vertically integrated cable operators and programming channels. *See, e.g., Echostar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd 2089, 2098 (1999) ("Section 628 is generally understood to be a mechanism for ensuring that MVPDs that are competing with traditional cable television systems are not deprived, through exclusive contracts, discriminatory pricing, or otherwise, of access to vertically integrated 'satellite cable programming.'"); *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, 10 FCC Rcd 3105, 3123 (1994) ("The legislative history of Section 628 specifically, and of the 1992 Cable Act in general, reveals that Congress was concerned with market power abuses exercised by cable operators and their affiliated programming suppliers that would deny programming to non-cable technologies . . .").

[8] MAP Letter, at 3.

statutory objectives."[9] Congress left no doubt just what those objectives are: the law was intended to "ensure that cable operators do not favor their affiliated programmers over others" and that "vertically integrated, national cable programmers . . . make programming available to all cable operators on similar price, terms, and conditions."[10] MAP provides no explanation for how Congress' goal of protecting MVPDs from discrimination based on affiliation possibly could justify wholesale government intrusion in a free market.

Moreover, as Viacom made clear in its reply comments in this proceeding, Section 628 specifically permits vertically integrated programmers to establish "different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."[11] In fact, when considering price differentials relating to "volume discounts," programmers are not limited to considering cost, but may also rely on "non-cost economic benefits related to increased viewership."[12]

Equally significant, MAP utterly ignores Section 624(f) of the Act, which mandates that a "Federal agency, State, or franchising authority *may not impose requirements regarding the provision or content of cable services*, except as expressly provided in this title."[13] The MAP Letter goes out of its way to invoke the legal doctrine that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[14] Yet MAP offers no explanation for its failure to reconcile its expansive reading of Section 628 with the restrictions expressly imposed by nearby provisions of the Act. Indeed, Section 624(f) definitively curtails the Commission's authority over the provision of cable

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[9] *See id.* (*citing In re Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd 18223, 18320 (1996); *In re Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd 20227, 20300 (1996)). Thus, even in the cases relied upon by MAP, the Commission was merely extending the program access rules to video programming vertically integrated with a satellite- or telephone company-based provider of multichannel programming; it was not engaging in any effort to expand the scope of Section 628 beyond non-discriminatory access to programming affiliated with an MVPD.

[10] S. Rep. No. 101-381, at 25.

[11] *See* Reply Comments of Viacom Inc., MB Docket No. 07-198 (filed Feb. 12, 2008), at 15, n.73 (*citing* 47 U.S.C. § 548(c)(2)(B)(iii) and 47 C.F.R. § 76.1002(b)(3) nt.).

[12] 47 C.F.R. § 76.1002(b)(3) nt.

[13] 47 U.S.C. § 544(f) (emphasis supplied).

[14] MAP Letter, at 4 (*citing Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)).

programming, reflecting Congress' belief that it is inappropriate "for government officials to dictate the specific programming to be provided over a cable system . . . ."[15] Congress also has repeatedly expressed its preference for marketplace negotiations, rather than regulation, to ensure competition in the market for video programming. The Statement of Policy that Congress included as part of the 1992 Cable Act, for example, confirms that reliance "on the marketplace" to achieve "a diversity of views and information through cable television" is paramount.[16]

The MAP Letter conveniently ignores these provisions, but MAP cannot through silence or ignorance simply will away Congress' unequivocal limitation on the Commission's authority.[17]

II. CONGRESS INTENDED SECTION 616 TO PROTECT INDEPENDENT PROGRAMMERS, NOT TO SERVE AS A BASIS FOR REGULATING THEM

MAP suggests that Section 616 of the Act can be read to provide the Commission with power to "adopt any rule relating to [program] carriage."[18] Specifically, MAP notes that the law states that the Commission shall establish regulations "governing programming carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors."[19] MAP heralds this language as a supposed indication that Congress intended to provide the Commission with a broad grant of authority. To the contrary, Congress intended Section 616 to protect independent programmers, not to serve as a basis for regulating them.

The MAP Letter's citation to Section 616 inexplicably excludes the salient language from the statute. Rather than serve as a broad grant of generic authority, Congress actually said in Section 616 that the Commission should "[w]ithin one year after the date of enactment of this section . . . establish" a specific

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[15] H. Rep. No. 98-934 (1984), at 26.

[16] H. Rep. No. 102-862 (1992), at 4.

[17] *See also Motion Picture Assoc. of America v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) ("*MPAA*") (*citing Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) ("Statutory provisions *in pari materia* normally are construed together to discern their meaning.")).

[18] MAP Letter, at 6 (*citing* 47 U.S.C. § 536).

[19] *Id.*

set of regulations governing the behavior of *cable operators* and other *MVPDs*.[20] By its plain terms, the statute does not bestow on the Commission any authority whatsoever to regulate independently-owned video programming networks. Furthermore, the statutory text expressly says: "Such regulations shall—", and then lists six rules for the Commission to adopt specifically to prevent MVPDs from demanding of independently-owned programming networks the rights to exclusivity or a financial interest in the network as a prerequisite for carriage.[21] The law does not, therefore, provide the Commission with unbounded authority to adopt any regulation affecting program carriage.

In fact, Section 616 was intended to *help* the owners of independent programming networks, such as Viacom, by protecting them against the putative market power that Congress saw cable operators as enjoying. As the legislative history makes clear, Congress' aim was to "prevent [MVPDs] from coercing from a program vendor a financial interest in a program service as a condition for distribution" and to "prohibit [MVPDs] from coercing a video programming vendor to provide exclusive rights against other [MVPDs] as a condition of distribution."[22] The Commission itself has repeatedly recognized that "Section 616 was intended to prevent a MVPD from requiring a financial interest in a program service or exclusive rights as a condition for carriage on the MVPD's system."[23]

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[20] 47 U.S.C. § 536(a).

[21] *Id.* Congress directed the Commission to promulgate regulations that were designed to: (1) prevent an MVPD from "requiring a financial interest in a program service as a condition for carriage;" (2) prohibit an MVPD from "coercing a video programming vendor to provide . . . exclusive rights . . . as a condition of carriage;" (3) prevent an MVPD from discriminating against unaffiliated programmers; (4) provide for expedited review of program carriage complaints; (5) provide for penalties for violations of Section 616; and (6) provide for penalties for abuse of the complaint process. *See id.* Regulation of independent, non-vertically integrated programmers is noticeably absent.

[22] H. Rep. No. 102-628 (1992), at 110.

[23] *In re 1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules*, 14 FCC Rcd 16433, 16434-35 (1999). *See also In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corp. et al.*, 21 FCC Rcd 8203, 8228 (2006) ("Congress enacted section 616 based on findings that some cable operators had required certain non-affiliated program vendors to grant exclusive rights to programming, a financial interest in the programming, or some other additional consideration as a condition of carriage on the cable system."); *In re General Motors Corp. and Hughes Electronics Corp.*, 19 FCC Rcd 473 (2003) (same); *Implementation of Section 302 of the Telecommunications Act of 1996*, 11 FCC Rcd at 18284 (same).

Again, MAP is completely off base and offers no explanation for how this provision possibly could support enactment of regulation that would be harmful to the very independent programmers that the provision was expressly designed to protect.[24]

III. THE COMMISSION'S CONSTRAINED ANCILLARY JURISDICTION PROVIDES NO BASIS FOR REGULATION OF THE VIDEO PROGRAMMING MARKET

The MAP Letter posits that in addition to the "direct" jurisdiction allegedly provided by Sections 616 and 628 of the Act, the Commission also has authority through Title I ancillary jurisdiction "to ensure access to vertically and non-vertically integrated programming."[25] Here, MAP stretches far beyond where the Commission's Title I powers permit it to go, and even farther beyond where any court has ever authorized the Commission's ancillary jurisdiction to be invoked. In fact, although again nowhere to be seen in MAP's letter, the courts have repeatedly – *and recently* – emphasized that the Commission's ancillary jurisdiction is constrained and permits only a limited application of authority in those cases where there is some predicate direct grant of authority upon which the Commission can base its actions.[26]

In other words, in the absence of some express grant of direct jurisdiction, the Commission's ancillary authority is of no relevance whatsoever. And since, as demonstrated above, neither Section 616 nor Section 628 possibly can be relied upon to permit regulation of the wholesale market for the sale of video programming, MAP's invocation of ancillary jurisdiction is a complete red herring.

The MAP Letter cites to the D.C. Circuit's decision in *American Library Association* for the proposition that the Commission can use its ancillary

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[24] Moreover, as Viacom previously has pointed out, it is not at all clear that Section 616 would permit the Commission to take any action today, given that it has been well more than one year since Congress granted the Commission limited authority to take action. *See* Comments of Viacom Inc., MB Docket No. 07-198 (filed Jan. 4, 2008), at 30 ("Viacom Comments").

[25] MAP Letter, at 6.

[26] *See, e.g.*, *American Library Assoc. v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); *MPAA*, 309 F.3d at 796. In fact, as recently as June 2008, the U.S. Court of Appeals for the Sixth Circuit reaffirmed that in order for the Commission to rely on its ancillary jurisdiction, it must posses appropriate underlying statutory authority. *See Alliance for Cmty Media, et al. v. FCC*, 529 F.3d 763 (6th Cir. 2008). There was no question in the case regarding whether the Act provided predicate authority for the Commission's cable franchising rules; the only issue was whether the Commission could invoke ancillary jurisdiction based upon a provision of law added to the Act via amendment.

jurisdiction in situations where (1) the Commission's general jurisdictional grant under Title I of the Act covers the subject of the regulations; and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.[27] This truism provides no comfort for MAP's arguments, however, because MAP cannot demonstrate that regulation of the provision of video programming networks would in fact be ancillary to the responsibilities that have been tasked to the Commission by Congress. The *American Library Association* decision also made quite clear that the "FCC, like other federal agencies, 'literally has no power to act . . . unless and until Congress confers power upon it.'"[28]

Indeed, the court in *American Library Association* took pains to caution against overzealous use of ancillary jurisdiction.[29] In particular, the court said that if there is "nothing in the statute, its legislative history, the applicable case law, or agency practice indicating that Congress meant to provide . . . sweeping authority," there is no reason for the Commission to strain itself looking for authority.[30] "As the Supreme Court has reminded us, Congress 'does not . . . hide elephants in mouseholes.'"[31] MAP similarly engages in such a strained reading of the Act that its analysis must be rejected as contrary to the notion of a cautious, constrained approach to ancillary authority.

MAP relies heavily on the Supreme Court's determination in *Southwestern Cable* that the Commission was not barred from using its ancillary jurisdiction to impose some regulation on the cable industry.[32] But even if *Southwestern Cable* stands for the notion that the cable industry generally falls within the ambit of Title I, MAP still has not shown (indeed it cannot show) that regulation of the sale of video programming networks – especially networks owned independently from any MVPD – would be ancillary to the FCC's performance of any of its statutorily mandated responsibilities. MAP's position, akin to the view taken by the Commission in *American Library Association*, "amounts to the bare suggestion that [an agency] possesses *plenary* authority to act within a given area

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[27] *See* MAP Letter, at 6-7 (*citing American Library Assoc.*, 406 F.3d at 700).

[28] *American Library Assoc.*, 406 F.3d at 698 (internal citation omitted).

[29] *See id.* at 702.

[30] *Id.* at 704.

[31] *Id.* (*citing Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

[32] *See* MAP Letter, at 7 (*citing U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968)).

simply because Congress has endowed it with *some* authority to act in that area."[33] The D.C. Circuit, however, has "categorically reject[ed] that suggestion."[34]

MAP asserts that various provisions of the Act might be capable of serving as a predicate grant of authority that would enable the Commission to regulate the wholesale video programming market.[35] For instance, MAP cites Sections 601(4), 601(6) and 612(g) of the Act, which among other things require the Commission to "assure that cable communications provide . . . the widest possible diversity of information sources and services to the public."[36] Of course, as Viacom and others repeatedly have made clear throughout this proceeding, the imposition of wholesale programming regulations actually would *hinder* the development and dissemination of diverse programming networks.[37] A coalition of civil rights leaders, for example, has explained that regulations "would deliver [a] . . . devastating effect on programming enjoyed by minority communities, while offering no benefit to these audiences whatsoever."[38] Moreover, the "seismic effect of" regulations

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[33] *American Library Assoc.*, 406 F.3d at 708 (internal citation omitted)

[34] *Id.* (internal citation omitted).

[35] *See* MAP Letter, at 8.

[36] *See* 47 U.S.C. §521(4). Section 532(g), it should be noted, by its express terms only permits regulation upon satisfaction of the so-called 70/70 test (and then only to ensure diversity of information on leased access channels). *See* 47 U.S.C. § 532(g). As Viacom explained in its comments in this proceeding, there is overwhelming evidence that the 70/70 test has not been satisfied. *See* Viacom Comments, at 26-27. Notwithstanding the suggestion in the MAP Letter, at 8, Section 612(g) cannot be relied upon for ancillary jurisdiction when the statutory requirements for direct jurisdiction remain unfulfilled.

[37] *See, e.g.*, Viacom Comments, at 14-15; Letter from The Honorable Lamar Alexander, *et al.*, to Chairman Martin (dated Feb. 12, 2008) at 1; Comments of the Walt Disney Company, MB Docket No. 07-198 (filed Jan. 4, 2008), at 60; Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., MB Docket No. 07-198 (filed Jan. 4, 2008), at 29; Comments of NBC Universal Inc. and NBC Telemundo License Co., MB Docket No. 07-198 (filed Jan. 4, 2008), at 55-56; Reply Comments of A&E Television Networks, MB Docket No. 07-198 (filed Feb. 12, 2008), at 17; Reply Comments of Discovery Networks, LLC, MB Docket No. 07-198 (filed Feb. 12, 2008), at 13; Reply Comments of TuTV, LLC, MB Docket No. 07-198 (filed Feb. 12, 2008), at 4.

[38] *See* Letter to Chairman Kevin J. Martin, *et al.* from Dr. E. Faye Williams, Esq., *et al.*, on behalf of National Congress for Black Women; A. Philip Randolph Institute; Hispanic Federation; Hispanic Technology & Telecommunications Partnership (HTTP); Labor Council for Latin American Advancement (LCLAA); Latinos in Information Sciences and Technology Association (LISTA); League of Rural Voters; League of United Latin American Citizens (LULAC); Minority Business Enterprise Legal Defense and Educational Fund; National Black Chamber of Commerce; National Black Justice Coalition; National Coalition of Latino Clergy & Christian

"would surely threaten the very existence of niche and minority programming."[39] Likewise, Spanish-language programmer TuTV, LLC has pointed out that programmers need "the freedom to offer volume discounts and channel packaging" if they want to have a chance of breaking into the competitive market.[40] Thus, contrary to the MAP Letter's assertions, regulation here would in fact contravene the Commission's statutory responsibilities. Quite clearly, the Commission cannot rely on ancillary authority to take action that would conflict directly with an enumerated statutory obligation.

Equally important, MAP selectively quotes only a portion of the text of Section 601(6) of the Act, which obligates the Commission not only to "promote competition in cable communications," as MAP notes,[41] but also to do so in a way that "*minimize[s] unnecessary regulation that would impose an undue economic burden on cable systems*."[42] Again, MAP cannot simply will away Congress' unequivocal requirement that the Commission rely on the marketplace – rather than regulation – to ensure competition and diversity in cable communications. In any event, Section 601 of the Act constitutes only a statement of the "purposes of this title"; it does not in and of itself grant the Commission any authority.[43]

MAP also specifically invokes Section 4(i) of the Act, which allows the Commission to "make such rules and regulations . . . not inconsistent with this

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Leaders; National Coalition on Black Civic Participation; National Council of Women's Organizations; and National Gay & Lesbian Chamber of Commerce (NGLCC), MB Docket No. 07-42 (dated May 29, 2008), at 1.

[39] *Id.* at 2.

[40] *See* Reply Comments of TuTV, LLC, at 4. As Viacom has explained, the sale of programming in packages has fostered the growth of diverse programming networks, including channels that target minority and niche audiences. Programmers often use packaging to ensure distribution of niche networks that otherwise would find it extremely difficult to obtain cable carriage. By offering price discounts on more widely popular networks, a programmer such as Viacom can provide incentives to encourage cable systems to carry networks such as Noggin, which provides commercial-free programming to pre-school-aged children. If the Commission were to preclude Viacom and others from selling networks in packages, a number of diverse networks might never obtain cable carriage. *See, e.g.*, Viacom Comments, at 14-15. In addition, new and diverse channels promoted by these packages serve as a place for independent producers to showcase their talent, as many do on BET, for instance.

[41] *See* MAP Letter, at 8.

[42] 47 U.S.C. § 521(6) (emphasis supplied).

[43] *See id.*

Act, as may be necessary in the execution of its functions."[44] But the D.C. Circuit has resoundingly rejected an overly expansive reading of this provision as well.[45] In particular, the court dismissed the Commission's effort to promulgate rules relating to "video description" for the visually impaired on the basis of Title I and in particular Section 4(i).[46] Just as in the case of proposed wholesale programming regulations, the court noted that the Act contained no express provision authorizing the Commission to implement video description rules.[47] The court then rebuffed the Commission for invoking Section 4(i), determining that particularly when a proposed regulation implicates program content, the Commission can act only if it been specifically delegated authority by Congress.[48]

There can be no doubt that regulation of the wholesale video programming market would implicate content. Indeed, the types of regulations sought by MAP and others in this proceeding necessarily would restrict the manner in which content owners could distribute their programming. Regulation simultaneously would discourage MVPDs from carrying certain content apparently disfavored by the government in favor of either no speech at all or other content that the Commission judges to be more valuable. As the court explained, however, "Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content."[49] It would not matter, moreover, if the regulations were deemed content neutral. The court addressed that very issue in the video description case, finding the question of content-neutrality "irrelevant to the inquiry of the FCC's delegated statutory authority."[50]

Finally, the D.C. Circuit emphasized that Section 4(i) cannot serve as a "stand-alone" basis of authority, nor can it be read in "isolation."[51] The provision

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[44] MAP Letter, at 7 (*citing* 47 U.S.C. § 154(i)).

[45] *See MPAA*, 309 F.3d at 806.

[46] *See id.*

[47] *See id.* at 807.

[48] *See id.* at 805.

[49] *Id.*

[50] *Id.* at 804.

[51] *Id.* at 806 (internal citation omitted).

permits regulation only when "'reasonably ancillary' to other express provisions."[52] Moreover, by its very terms, Section 4(i) mandates that the Commission's exercise of ancillary authority "cannot be 'inconsistent' with other provisions of the Act."[53] As set forth above, though, regulation of the wholesale video programming market would be directly contrary to another provision of the Act – namely Section 624(f). The D.C. Circuit has explained that the reasons for limiting the Commission's ancillary jurisdiction are quite clear: "Were an agency afforded *carte blanche* under such a broad provision [as Section 4(i)], . . . it would be able to expand greatly its regulatory reach" beyond the bounds established by Congress.[54] In short, the Commission should reject MAP's invitation to rely on ancillary authority to regulate the wholesale video programming market.[55]

Not only has MAP urged a far more expansive reading of the Commission's ancillary jurisdiction than is warranted by the statute and prevailing case law, but MAP also has failed to substantiate any factual need for government regulation of the wholesale programming market.

In particular, the MAP Letter repeatedly refers to allegations of "tying" whereby MVPDs are purportedly compelled to purchase "content that [they] do not want to carry, but must accept as a condition of being able to carry very popular programming."[56] MAP supports these contentions merely be reciting to comments filed in this proceeding by the American Cable Association ("ACA"), which leveled a variety of anecdotal allegations, though not a single charge supported by rigorous analysis or tangible evidence. ACA, in fact, already has admitted that programmers do *not* engage in "tying."[57] Its comments acknowledge that networks are available for purchase individually, revealing ACA's true goal in this proceeding: government price regulation for the wholesale programming market. In any event, Viacom and other commenters have thoroughly refuted these so-called

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[52] *Id.* (internal citation omitted).

[53] *Id.* (*citing* 47 U.S.C. § 154(i)).

[54] *Id.* (internal citation omitted).

[55] Although Viacom does not own any full power television stations, it notes that MAP's arguments with respect to the use of ancillary authority to regulate the retransmission consent process are equally unavailing. *See* MAP Letter, at 8-12. Given that Congress has said clearly that broadcasters should have the right to rely on "marketplace negotiations" to determine the outcome of retransmission consent bargaining, the Commission is without authority to interfere. *See* 47 U.S.C. § 325; *see also* S. Rep. No. 102-92, at 36 (1991).

[56] MAP Letter, at 1.

[57] *See* ACA Comments, at 13.

"tying" charges, proving through unrebutted economic analyses of actual carriage agreements that programming networks *are* available for purchase on a stand-alone basis and that many small and rural MVPDs *do* carry just one or two of a particular programmer's channels.[58]

As demonstrated by the expert economic report of Dr. Bruce Owen, for instance, 30 percent of small cable systems carry only one or two of Viacom's networks, and fully 95 percent of small systems carry less than half of Viacom's channels; not a single small system carries every Viacom-owned network.[59] Dr. Owen reached similar conclusions with respect to networks owned by NBC Universal and Fox Entertainment Group.[60] The uncorroborated "tying" allegations repeated in the MAP Letter are so thoroughly in conflict with the record evidence that the Commission must disregard them, and in doing so, find that no factual basis exists to support MAP's call for replacement of the free market with government regulation.

IV. CONTRARY TO MAP'S ASSERTIONS, SUPREME COURT PRECEDENT MAKES CLEAR THAT THE FCC CANNOT IGNORE THE FIRST AMENDMENT WHEN CONSIDERING REGULATION OF CABLE PROGRAMMERS

Finally, MAP claims that Commission regulation of the wholesale video programming market would have no impact on programmers' and cable systems' First Amendment rights.[61] This assertion flies in the face of clear Supreme Court precedent, and represents a minimalist reading of the First Amendment that cannot be reconciled with the Constitution. While MAP correctly points out that content owners are not entirely "immune" from economic and trade regulations simply by virtue of their status as "speakers," MAP nonsensically argues that a

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[58] *See, e.g.*, Viacom Comments, at 9-14; Comments of NBC Universal Inc. and NBC Telemundo License Co., MB Docket No. 07-198 (filed Jan. 4, 2008), at 37-41; Comments of The Walt Disney Company, MB Docket No. 07-198 (filed Jan. 4, 2008), at 49-51; Reply Comments of Discovery Communications, LLC, MB Docket No. 07-198 (filed Feb. 12, 2008), at 8.

[59] *See* Viacom Comments, at Appendix 2, Dr. Bruce M. Owen, Economists Incorporated, *Wholesale Packaging of Video Programming*, at 12, Figure 1 (Jan. 4, 2008) ("*Owen Report*").

[60] *See id.* at 14-21.

[61] *See* MAP Letter, at 13-14.

financial regulation "not intended to suppress any sort of message" does not even "implicate First Amendment scrutiny."[62]

The Supreme Court has made abundantly clear, however, that *any* regulation impacting free speech – even if primarily intended to affect economic competition – requires careful examination to ensure that fundamental First Amendment freedoms are not infringed.[63] Indeed, the Court has expressly held that "laws that single out the press, or certain elements thereof, for special treatment . . . *are always subject to at least some degree of heightened* First Amendment scrutiny."[64] And there can be no mistake: the Court also has made clear that "[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[65] Thus, notwithstanding MAP's assertions, the Commission cannot simply ignore the critical First Amendment questions that would be raised by regulation here.

MAP posits in the alternative that any regulation would at most warrant intermediate scrutiny.[66] The courts, however, also have emphasized that laws that "regulate speech based on its content or 'that compel speakers to . . . distribute speech bearing a particular message' are subject to strict scrutiny."[67] Any Commission rule prohibiting programmers from selling their networks in packages would be tantamount to a restriction on the content owner's ability to distribute its speech – and on its exercise of "editorial control and judgment" – in the manner it sees fit.[68] Accordingly, any proposed regulation here should be subjected to strict scrutiny, which would make it "presumptively invalid" and capable of surviving only

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62 *Id.* at 14.

63 *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 640-41 (1994) ("*Turner*") (rejecting the government's contention that rational scrutiny should apply to an economic-based law of general applicability that was directed at cable operators and programmers).

64 *Id.* (emphasis supplied).

65 *Id.* at 636.

66 *See* MAP Letter, at 14.

67 *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 966 (D.C. Cir. 1996) (*citing Turner*, 512 U.S. at 642).

68 *Turner*, 512 U.S. at 653; *see also id.* at 636 ("Through 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators seek to communicate messages on a wide variety of topics and in a wide variety of formats") (internal citation omitted).

if the rule promotes a "compelling interest" and employs "the least restrictive means to further the articulated interest."[69] Given the uncontroverted evidence that programmers are not engaged in tying, and that no MVPD is forced to accept unwanted programming, there is no way that the Commission could demonstrate a compelling governmental interest in regulating the wholesale market for the sale of video programming.

Even if any new regulation were deemed to be "content neutral," it still could not survive intermediate constitutional scrutiny, which requires (i) the existence of a "substantial governmental interest" that is "unrelated to the suppression of free expression" (with the purported harms sought to be addressed being "real, not merely conjectural"); and (ii) that the restriction on speech "is no greater than is essential to the furtherance of that interest."[70] First, any effort by the government to regulate the manner in which networks are sold necessarily relates to the suppression of some speech (that owned by programmers with multiple networks) in favor of either no speech at all or other, apparently favored speech (that owned by programmers with but a single network). Second, in the absence of any evidence that MVPDs actually are harmed by the existing free market approach to the sale of video programming, the Commission would be hard pressed to establish a substantial governmental interest warranting redress. For that matter, the utter lack of evidence of harm suggests that the Commission could not even sustain wholesale programming regulations under a rational basis test.[71]

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In sum, the MAP Letter fails to demonstrate that the Commission has jurisdiction to regulate the wholesale market for the sale of video programming generally, let alone independently-owned programming networks. Nor has MAP shown that any potential regulation would survive First Amendment scrutiny. Indeed, notwithstanding the unsupported "tying" allegations repeated in the MAP Letter, the record demonstrates that both vertically integrated and independent programmers *do* make their networks available for purchase on a stand-alone basis. Thus, the Commission has no need even to consider displacing the fully functioning free market in favor of intrusive governmental regulation. For all of the reasons set

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69 *Time Warner*, 93 F.3d at 966 (internal citation omitted).

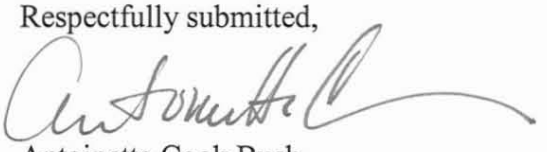
70 *See Turner*, 512 U.S. at 662 (*citing United States v. O'Brien*, 391 U.S. 367 (1968)) and 664 (*citing Edenfield v. Fane*, 507 U.S. 761 (1993)).

71 To be clear, the courts have emphasized that the FCC must rely on "a record that validates the *regulations*, not just the abstract statutory authority." *See Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1130 (2001).

forth herein, and in Viacom's previous filings in this proceeding, the Commission should determine once and for all that regulation of the wholesale video programming market is neither necessary nor appropriate.

The above-referenced proceeding has been accorded permit-but-disclose status, and this filing is made pursuant to Section 1.1206(b) of the Commission's rules. Should you have any questions concerning this submission, kindly contact the undersigned.

Respectfully submitted,



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